

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
SEA LINK OF HAWAII, INC.)
To Transfer Property.)
_____)

DOCKET NO. 02-0212

DECISION AND ORDER NO. 21085

DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

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Karen Higashi
Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi

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In the Matter of the Application of)	
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DECISION AND ORDER

I.

Introduction

SEA LINK OF HAWAII, INC. ("Sea Link") requests commission approval for the transfer of its inter-island ferry service vessels to Maui Marine Leasing, Inc. ("MML") and certain financial arrangements concerning its ferry service between the islands of Maui and Molokai. Specifically, Sea Link requests *nunc pro tunc* approval for the following: (1) transfer of the vessels, the Maui Princess and Molokai Princess, from Sea Link to MML; (2) Sea Link's subsequent re-acquisition of the Maui Princess, on a part-time basis, through a charter agreement with Seven Seas Cruises, Inc. ("Seven Seas")¹; and (3) the lease of the Molokai Princess to Sea Link by MML (collectively, "Transactions").

¹Seven Seas is a corporation owned by Sea Link's shareholders. See Amended Application at 3. MML leases the Maui Princess to Seven Seas on a yearly basis for use by its tourist operations Id. Exhibit "B".

Sea Link filed its application on August 13, 2002 ("Original Application"), and amended it on February 11, 2003 ("Amended Application"), pursuant to Hawaii Revised Statutes ("HRS") § 271G-14 and Hawaii Administrative Rules § 6-61-105.

Sea Link served copies of the Original and Amended Application on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"). The Consumer Advocate filed a statement of position ("Initial SOP") on August 14, 2002, indicating that it would not participate in this docket. On August 21, 2002, it withdrew its Initial SOP, and notified the commission that it would participate in the instant proceeding. The Consumer Advocate issued information requests ("IRs") to Sea Link on August 30, 2002. In lieu of responding to the IRs, Sea Link submitted its Amended Application on February 11, 2003.

On May 19, 2003, the Consumer Advocate issued IRs relating to the Amended Application. Sea Link filed responses to these IRs on July 3, 2003 ("Sea Link's Responses to Consumer Advocate"). On September 12, 2003, the Consumer Advocate filed a supplemental statement of position.

On October 2, 2003, the commission issued IRs to Sea Link, to which Sea Link responded on November 14, 2003 ("Sea Link's Responses to commission IRs").

II.

Background

Sea Link is a Hawaii corporation incorporated on October 31, 1986.² Sea Link provides ferry service between Maui and Molokai. At the onset of its service in 1987, Sea Link received subsidies from the State of Hawaii ("State") for its employee commuter service. By 1996, the State eliminated such subsidies, thus, Sea Link thereafter ceased its ferry service. Sea Link subsequently leased the Maui Princess to Seven Seas, which converted it, at Seven Seas' own expense, from a ferry to a multi-use tour vessel.

In 2000, Sea Link arranged to acquire a new vessel, the Molokai Princess, for use as a ferry. Sea Link indicated that the Molokai Princess would be more cost effective to operate than the Maui Princess, and that it could use the Maui Princess and other leased or chartered vehicles on an as-needed basis.³ Because the loan for purchase of the new vessel would place Sea Link's shareholders and corporations owned by Sea Link's shareholders at some financial risk, Sea Link was advised to create a holding

²Pursuant to Decision and Order No. 9568, filed on November 13, 1987, in Docket No. 5947, Sea Link was granted temporary authority, for a period of one year, to operate as a common carrier of passengers and property by water between the islands of Oahu, Molokai, and Maui using the vessel, the Maui Princess. By Decision and Order No. 9912, filed on September 27, 1988, in Docket No. 6240, Sea Link was granted a permanent certificate to provide transportation as a common carrier of passengers and property by water between the islands of Oahu, Molokai, and Maui. By Decision and Order No. 10007, filed on November 10, 1988, in Docket No. 6345, the commission granted Sea Link's request to indefinitely suspend its sailing schedule between Kaunakakai, Molokai and Honolulu, Oahu.

³See Amended Application at 3.

company, MML, to guarantee and service the debt on the newly acquired vessel. In October 2000, upon payment in full of Sea Link's previous mortgage on the Maui Princess, Sea Link transferred title to both the Maui Princess and the Molokai Princess to MML.

Presently, Sea Link continues to operate its inter-island ferry service between the islands of Maui and Molokai utilizing the Maui Princess and the Molokai Princess through charter and lease agreements, respectively, executed on October 15, 2002.⁴

III.

Consumer Advocate's Position

In reviewing Sea Link's application, the Consumer Advocate concentrated its analysis on (1) whether transferring ownership of the Maui Princess and the Molokai Princess is reasonable and (2) whether the rates, terms and conditions of the charter and lease agreements are reasonable.⁵

⁴See Amended Application Exhibits "C" and "D".

⁵The Consumer Advocate also briefly addressed the issues of ownership of the Molokai Princess and Sea Link's financial ability to provide ferry service. It determined that it was satisfied with the documentation of the chain of ownership of the Molokai Princess from private parties to Sea Link and finally to MML. Second, while conceding that Sea Link's financial viability may be outside the scope of the instant application, the Consumer Advocate notes that Sea Link is dependent upon its affiliates to absorb certain operational costs, and therefore recommends that it be required to submit an annual financial report to the commission and the Consumer Advocate.

As discussed below, the Consumer Advocate's short answer to both issues is yes.

A.

Whether Transferring Ownership of the Vessels is Reasonable

As stated above, MML was created to act as a holding company to guarantee and service the debt for the Molokai Princess. The Consumer Advocate recognizes that Sea Link made decisions regarding the ownership of the Maui Princess and Molokai Princess based upon its financial needs at the time. Thus, as a means to avoid placing its shareholders' and corporate assets at risk, MML was created as a holding company and ownership of the vessels transferred to MML. The Consumer Advocate states that it does not object to the transfer of ownership of the Maui Princess and Molokai Princess to MML from Sea Link.

B.

Whether the Rates, Terms and Conditions of the Charter and Lease Agreements are Reasonable

HRS § 271G-17.5 provides, in relevant part, that leases of more than three years and leverage leases for the acquisition of property by water common carriers require commission approval prior to entering into such agreements. Sea Link's charter and lease agreements for the Maui Princess and Molokai Princess are for a period of less than three years and Sea Link never represented that these agreements were leverage leases.⁶ Nevertheless, the

⁶Both agreements run from October 15, 2003, through October 14,

Consumer Advocate believes that a review of the charter and lease agreements is necessary to ensure that Sea Link's customers are not negatively affected. We agree. Therefore, as discussed below, we will review these agreements under HRS § 269-7(a).

Sea Link has agreed to lease the Molokai Princess from MML at a cost of \$3,995 per month. Sea Link has also agreed to charter the Maui Princess from Seven Seas for \$1,700 a month. Sea Link originally leased the Molokai Princess from MML for \$7,500 per month.⁷ In response to the Consumer Advocate's inquiry regarding the reduction in lease payments, from \$7,500 to \$3,995, Sea Link says only that "[i]t was decided that the vessel should be leased at approximate cost".⁸ The Consumer Advocate presumes that the lease payment was set to cover only the monthly debt service, excluding such operating costs as fuel costs and the cost of a crew.⁹

Based upon the information provided by Sea Link, the Consumer Advocate does not object to the rates, terms and conditions of the lease and charter agreements entered into between Sea Link, Seven Seas and MML.

2004. See Sea Link's Responses to commission IRs, PUC-IR-7 and PUC-IR-9.

⁷See Sea Link's Original Application, Exhibit A.

⁸See Sea Link's Responses to Consumer Advocate, CA-IR-25(c).

⁹Id. at CA-IR-21a, CA-IR-22a and CA-IR-22b.

IV.

Discussion

HRS § 271G-14(a) provides, in relevant part, that no water carrier shall sell, lease, assign, mortgage, or otherwise dispose of any part of its property that is necessary or useful in the performance of its transportation services, without first having obtained from the commission authority to do so. It further provides that any such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made without approval from the commission is void.

HRS § 269-7(a) authorizes the commission to examine the condition of each public utility, its financial transactions, and "all matters of every nature affecting the relations and transactions between it and the public or persons or corporations." Thus, the commission has jurisdiction to review the financial transactions of the parent or affiliated entities of a regulated public utility under HRS § 269-7(a). Under this section, the commission will approve the proposed financial transaction if it is reasonable and consistent with the public interest.¹⁰ In this instant docket, because the charter and lease agreements concern financial transactions of Sea Link's parent and affiliated entities, we will review these transactions under HRS § 269-7(a).

The commission finds that Sea Link transferred title to both the Maui Princess and the Molokai Princess on October 2000. However, its Original Application for commission approval of such transactions came in August 2002. Similarly, although the charter

and lease agreements were executed on October 2002, Applicant did not apply for commission approval of these transactions until its Amended Application filed in February 2003. The commission does not have the statutory authority under either HRS chapters 271G or 269 to grant retroactive approval of Sea Link's Transactions, described above. Accordingly, the commission declines to legitimize the Transactions *nunc pro tunc* and concludes that Sea Link's request for approval, *nunc pro tunc*, of the transactions should be denied.¹¹

The commission finds and concludes, however, that it is reasonable, and consistent with our statutory mandate, to approve Sea Link's Transactions on a prospective basis. Upon a review of Sea Link's Amended Application and the entire record, the commission finds the Transactions to be just and reasonable, and consistent with the public interest, pursuant to HRS §§ 271G-14 and 269-7(a). The commission agrees that Sea Link's reorganization, transfer of vessels and charter and lease agreements are necessary to Sea Link's financial viability if it is to continue the operation of its ferry service. Accordingly, the commission concludes that the Transactions should be approved, on a prospective basis.

¹⁰See, Decision and Order No. 19874, filed on December 13, 2002, in Docket No. 02-0345.

¹¹See In re Venture Telecom, LLC, 2002 WL 32064075 (N.Y.D.P.S.); In re UniDial, Inc., 1998 WL 34049867 (N.Y.P.S.C.); In re SuperShuttle International, Inc., 1998 WL 1109325 (Cal. P.U.C.). Because commission approval will not have retroactive effect, Sea Link assumes the responsibility for remedying any legal consequence resulting from the failure to obtain commission approval prior to the close of the Transactions

V.

Orders

THE COMMISSION ORDERS:

1. Sea Link's request for approval, *nunc pro tunc*, of (a) the transfer of the Maui Princess and Molokai Princess from Sea Link to MML; (b) the charter of the Maui Princess by Sea Link from Seven Seas; and (c) the lease of the Molokai Princess by MML to Sea Link, is denied.

2. Sea Link's (a) transfer of the Maui Princess and Molokai Princess to MML; (b) charter of the Maui Princess from Seven Seas; and (c) lease of the Molokai Princess from MML; are approved, prospectively, from the date of this order, pursuant to HRS §§ 271G-14 and 269-7(a).

3. Pursuant to HRS § 271G-18, Sea Link shall continue to submit a copy of its financial statement to the commission and Consumer Advocate on an annual basis so that the commission and Consumer Advocate may monitor the financial condition of Sea Link's regulated ferry service.

4. Sea Link shall ensure that the commission and the Consumer Advocate are provided copies of the current lease and charter agreements for the Molokai Princess and the Maui Princess each year for as long as the charter and lease agreements remain in effect.


5. Sea Link shall promptly comply with the requirements set forth above. Failure to comply with these requirements may

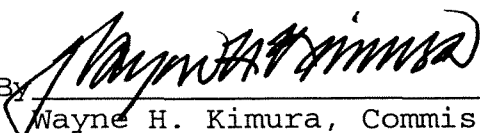
pursuant to HRS § 271G-14. Id.

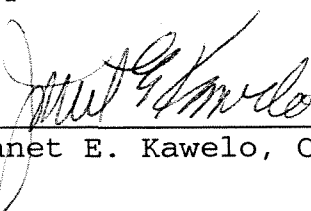
constitute cause to void this decision and order, and may result in further regulatory action, as authorized by law.

DONE at Honolulu, Hawaii this 25th day of June, 2004.


PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Benedyne S. Stone
Commission Counsel

02-0212.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21085 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
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Karen Higashi

DATED: June 25, 2004